

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL HENRY BISSON,

Defendant-Appellant.

UNPUBLISHED

February 22, 2000

No. 214254

Delta Circuit Court

LC No. 97-006209-FH

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), for which he was sentenced to six months' jail time. Additional charges of obstruction of justice, MCL 750.505; MSA 28.773, and domestic violence, MCL 750.81(2); MSA 28.276(2), were dismissed. Defendant appeals as of right. We affirm.

This case arose when defendant's live-in girlfriend and others disclosed information to the police, leading to a controlled drug purchase and subsequent search of defendant's home. Drugs and drug-related contraband were seized from the home, and defendant was convicted following a jury trial. In his first issue raised on appeal, defendant claims that the evidence seized during the search of his home should have been suppressed because the prosecution failed to provide defendant with a copy of the affidavit supporting the request for a search warrant. We disagree. We review a trial court's decision to suppress evidence for clear error. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

MCL 780.655; MSA 28.1259(5) requires that an officer seizing property pursuant to a search warrant "shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant . . . or shall leave a copy of the warrant . . . at the place from which the property or thing was taken." A copy of the affidavit is part of the "copy of the warrant" where the affidavit is used in lieu of a statement of probable cause in the warrant. *People v Garvin*, 235 Mich App 90, 98-

99; 597 NW2d 194 (1999). However, the failure to attach an affidavit to a search warrant does not require the suppression of evidence seized pursuant to that warrant. *Id.* at 99-100.

We also reject defendant's claim that he was prejudiced by the failure to comply with the statute. Defendant contends that, if he had been given a copy of the supporting affidavit, he would likely have known who the prosecution witnesses were and could have avoided being charged with obstruction of justice. However, defendant has shown no prejudice in this regard because the obstruction of justice charges were dismissed. Equally meritless is defendant's contention that, if he had been given a copy of the supporting affidavit, he would have realized that his live-in girlfriend was one of the police informants and he would not have continued to live with her and share confidential, incriminating information with her. In light of testimony that defendant had been selling drugs for years, his girlfriend's brief statements that he continued to use drugs after his arrest was irrelevant to both the charges and his conviction.

Next, defendant contends that the warrant issued pursuant to the search of his home was issued without probable cause. We disagree. A search warrant may not issue without probable cause to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651; MSA 28.1259(1). Probable cause exists when the facts and circumstances would lead a person of reasonable prudence to believe that a crime has been committed and that the evidence sought is in a stated place. *People v Hadley*, 199 Mich App 96, 100; 501 NW2d 219 (1993). Probable cause must be based on facts sworn or affirmed to the issuing magistrate, *People v Mitchell*, 428 Mich 364, 367-368; 408 NW2d 798 (1987), and a supporting affidavit must contain facts within the affiant's knowledge rather than mere conclusions or beliefs. *People v Cooper*, 166 Mich App 638, 652; 421 NW2d 177 (1987).

Defendant did not satisfy his burden of proof with respect to his claim that material omissions were made from the affidavit filed in support of the request for a search warrant. A claim that material information was omitted from a supporting affidavit requires a defendant to show, by a preponderance of the evidence, (1) that the affiant knowingly and intentionally, or with a reckless disregard for the truth, omitted information from the affidavit, and (2) that the omissions were necessary for a proper finding of probable cause. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). Defendant has not shown that the affiant in this case knowingly, intentionally, or with a reckless disregard for the truth, omitted information from his affidavit, and the record does not support such a conclusion. Therefore, the court properly denied defendant's motion to suppress the evidence on the basis of omissions from the supporting affidavit.

Defendant also contends that the affidavit contained insufficient affirmative allegations regarding the informants. We disagree. An affidavit prepared on the basis of information provided by a confidential informant must provide sufficient facts from which a magistrate could find that the information supplied was based on personal knowledge and that either the unnamed person was credible or that the information was reliable. MCL 780.653; MSA 28.1259(3); *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996). When reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner, to determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of

probable cause. *Id.* at 705. Here, we conclude that the affidavit, which included affiant's statement that within the past 72 hours of October 29, 1997, an informant went to defendant's residence "and purchased one ounce of marijuana for \$210 in a buy controlled by Affiant," contained sufficient facts regarding the informant's personal knowledge, credibility and reliability to establish probable cause for issuance of the warrant. See *People v Williams*, 139 Mich App 104, 107-108; 360 NW2d 585 (1985).

Next, defendant contends that the trial court erred in failing to dismiss the charges due to the prosecution's discovery violations. The trial court's decisions with respect to discovery violation remedies are reviewed for an abuse of discretion. MCR 6.201(J). When the discovery requirements of MCR 6.201 have been violated, it is within the court's discretion to fashion an appropriate remedy after balancing the interests of the court, the parties, and the public. That balancing includes consideration of the reasons for noncompliance and the resultant prejudice, if any. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997). "Under due process principles, the prosecution is obligated to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment." *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). In light of the prosecution's obligation to disclose evidence, this Court has held that a trial court did not abuse its discretion in dismissing the charges against a defendant in response to the prosecutor's complete failure to insure that defendants were provided with timely discovery and the prosecutor's failure to comply with discovery orders. See *Davie, supra* at 598-599.

Here, defendant contends that we should vacate his conviction because of the cumulative impact of the pervasive and deliberate nature of the discovery violations. In order to address defendant's contention, we must briefly review the record of the discovery that occurred. On or about October 31, 1997 defense counsel requested discovery, including any written or recorded statements of any witness the prosecution intended to call at trial, all physical evidence, any police reports, field notes and audio tapes, any written or recorded statements, disclosure of any plea agreements or grants of immunity and the result of all forensic tests. On or about November 11, 1997, defense counsel made a second request for the production of all logs and log notes of police surveillance officers, all notes from which any report or affidavit was prepared, all containers for independent fingerprint analysis, all photographs, video and audio tapes, and all documents regarding wire taps of any of defendant's telephones. Then, on or about November 16, 1997, defendant moved to suppress evidence and compel discovery, alleging that he had not been provided with any requested materials. Finally, on or about January 26, 1998, defendant filed an amendment to his motion to suppress evidence and compel discovery. It appears that on or about June 1, 1998, the trial court ordered the government to provide defendant certain material by June 2, including all logs and log notes from surveillance officers, all other notes from which any report or affidavit was prepared, all photographs, video and audio tapes. The order further provided that any evidence not provided would not be admissible at trial.¹

On June 21, 1998, eight days before trial, defendant moved to dismiss based upon the prosecution's failure to provide discovery. While the trial court's order denied defendant's motion to dismiss, it granted defendant alternative relief by suppressing the admission of the following items of evidence except in rebuttal:

- a. Any Marked funds or any potential testimony which might suggest that marked funds were recovered from the Bisson/Carrington residence and the witnesses should be instructed not to mention the marked funds;
- b. Any testimony or reports regarding fingerprints;
- c. Any drug analysis testimony or reports which were not furnished to the defense within the time limits imposed in earlier order [sic] of this Court;
- d. Any photographs not furnished to the defendant within the time limits imposed in earlier order [sic] of this Court;
- e. Any testimony by the government regarding any surveillance of the Bisson/Carrington residence as may be reflected in any police report not furnished

Defendant further notes that he was not furnished with the copies of the taped statements of witnesses Sylvi Carrington and Joyce Corbett until the close of the first day of trial and that he did not discover the existence of intelligence reports and confidential informant files until after the first day of trial. In addition, defendant claims on appeal that the prosecution concealed the existence of and data from the pen register of telephone calls until “the eve of trial;” that the prosecution failed to furnish defendant with a copy of the initial complaint for weeks after defendant had been charged; that the affidavit in support of the search warrant was withheld for nearly four weeks; that defendant was denied an opportunity to examine the physical evidence seized from the house until the trial had commenced; that the prosecution failed to disclose that the “marked” money seized pursuant to the warrant was not seized from defendant’s person but found in the dwelling; that the prosecution failed to disclose fingerprint reports for seven months; that the prosecution repeatedly represented that it had turned over all police reports, even as other undisclosed reports surfaced; that the prosecution failed to disclose the existence of an audio tape interview with two key witnesses until the trial commenced; and that the prosecution failed to list their three key witnesses on the information.

While defendant claims numerous discovery violations, we cannot conclude that the trial court’s failure to grant defendant’s motion to dismiss constituted an abuse of discretion. The trial court suppressed substantial amounts of evidence. Furthermore, while defendant complains that he did not have access to the actual audio tapes of the statements made by Carrington and Corbett when the trial commenced, the trial court noted that those tapes related to the charges of obstruction of justice and domestic violence, and imposed a sanction against the prosecution for failing to release the tapes by not allowing either Carrington or Corbett to testify regarding those two charges. Ultimately, both of those charges were dismissed. Accordingly, we hold that the trial court did not abuse its discretion in denying defendant’s motion to dismiss.

In his final claim on appeal, defendant contends that the trial court erred in precluding him from fully and fairly impeaching Corbett, a prosecution witness, when it ruled that Corbett had not waived her constitutional privilege against self-incrimination. We review the trial court’s admission of evidence under an abuse of discretion standard. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

An abuse of discretion exists only when an unprejudiced person, considering the facts, would say there was no justification or excuse for the ruling. *Id.* Further, we review questions of law regarding constitutional issues de novo. *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1997).

Defense counsel filed a motion in limine before trial advising the court that Corbett was employed during the time period she allegedly purchased drugs from defendant and that she had represented that she was unemployed during this time period for purposes of collecting AFDC (Aid to Families with Dependent Children) and for income tax reporting purposes. Defendant anticipated that Corbett would likely invoke her Fifth Amendment privilege against self-incrimination if questioned with respect to issues likely to subject her to criminal liability for tax or welfare fraud, and requested that she be precluded from testifying. In the alternative, defendant requested that Corbett's testimony be limited to "facts directly related to the obstruction of justice charge in the event she seeks to invoke the Fifth Amendment." The trial court noted that extrinsic evidence could not be used to prove specific instances of conduct to attack a witness's credibility, MRE 608(b), but agreed that defense counsel would be allowed to challenge Corbett's direct testimony on cross-examination. The court ruled that defendant could not use this information in opening statement, but reserved judgment with respect to whether defendant would be allowed to question Corbett in this regard during cross-examination.

At trial, Corbett claimed that she purchased both cocaine and marijuana from defendant on a regular basis during an eight-year time period. Based on Corbett's estimates regarding how much of each drug she was purchasing each week and the costs of those drugs, defense counsel calculated that she spent approximately \$40,000 during those eight years:

Q. And you were buying it three to four times a month, twelve months of the year, for seven or eight years, where you were spending approximately what – about \$40,000 in cocaine over the last eight years?

A. I guess.

Q. You didn't have that kind of money, did you?

A. I worked a lot.

Q. You didn't work, did you?

A. What?

Q. You didn't really work, did you?

[Prosecutor]: I object.

The witness: Yes, I did.

At this point, the jury was excused from the courtroom and defense counsel argued that he should be allowed to impeach the witness with Family Independent Agency (FIA) records and Internal Revenue Service (IRS) documents showing that Corbett represented to these agencies that she was unemployed during the time period in question. The trial court held that Corbett had not waived her privilege. After reviewing the record, we agree with defendant that Corbett waived her privilege against self-incrimination and that defense counsel should have been allowed to question her with respect to representations made to the FIA and the IRS. However, we conclude that the trial court's error was harmless.

MRE 613 allows the use of a witness's prior inconsistent statements to impeach that witness; however, the Revised Judicature Act provides that a witness may not be compelled to give any answer which has a tendency to accuse the witness of any crime or misdemeanor. MCL 600.2154; MSA 27A.2154. In *People v Fuzi #1*, 116 Mich App 246, 251; 323 NW2d 354 (1982), this Court explained the correlation between a witness's privilege against self-incrimination and a defendant's right to confront witnesses, US Const, Am VI; Const 1963, art 1, § 20:

In *United States v Cardillo*, 316 F2d 606 (CA 2, 1963), the court discussed the assertion of a witness's privilege against self-incrimination and its effect on an accused's right to confront witnesses. If a witness's assertion of the privilege merely precludes inquiry into collateral matters bearing only on the witness's general credibility, the witness's testimony may be used against the defendant. If assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination, the witness's testimony should be stricken in whole or in part. [*Id.* at 611.] If the purpose of the attempted cross-examination is a particular attack relating to the specific events of the crime charged, a restriction of such cross-examination may result in a denial of a defendant's Sixth Amendment right. *United States v Garrett*, 542 F2d 23 (CA 6, 1976). It is not permissible, for example, to curtail an accused's attempt to establish a witness's bias or interest in the outcome of the prosecution. *Id.*

The Court went on to instruct that if the "accused's legitimate purpose is to go beyond an attack on the witness's general credibility, the witness's assertion of the Fifth Amendment and the consequent restriction on the scope of cross-examination may constitute reversible error." *Id.*

Here, Corbett's testimony that she "worked a lot" was not, as the prosecution contends, relevant only to Corbett's general credibility. Defendant was on trial for drug trafficking, and Corbett testified that she had purchased drugs from defendant on numerous occasions over an eight-year period. Consequently, testimony indicating that Corbett did not have \$40,000 was relevant to a material issue in the case, i.e., Corbett's prior statements to the FIA and the IRS tended to make it less probable that she purchased \$40,000 worth of drugs, MRE 401, and less probable that defendant intended to sell, rather than merely possess, the drugs. Because Corbett's income went directly to the issue of whether defendant sold drugs to her, defendant should have been allowed to impeach her in this regard.

Presuming then, that the evidence defendant sought to admit was relevant and that defendant had a constitutional right to confront the witness with respect to how she could afford to purchase the

drugs, the question remains of whether Corbett waived her Fifth Amendment privilege against self-incrimination with respect to the IRS and FIA forms. As a preliminary matter, we note that MRE 608(b) provides that the giving of testimony by a witness does not operate as a waiver of the witness' privilege against self-incrimination "when examined with respect to matters which relate only to credibility." As already discussed, Corbett's representations to the FIA and IRS related to more than her general credibility. Therefore, the prohibition in MRE 608(b) does not apply here.

A witness must claim his or her privilege against self-incrimination; that is, the privilege is not self-executing. *People v Smith*, 257 Mich 319, 322; 241 NW 186 (1932); *Minnesota v Murphy*, 465 US 420, 431; 104 S Ct 1136; 79 L Ed2d 409 (1984). "Where a witness voluntarily testifies, he may not claim the privilege on matters put into issue by his own testimony." *Meyer v Walker Land Reclamation, Inc*, 103 Mich App 526, 532; 302 NW2d 906 (1981). Further, where a witness voluntarily offers testimony upon any fact, the witness waives the privilege as to all other relevant facts. *People v Russell*, 27 Mich App 654, 662; 183 NW2d 845 (1970). Here, Corbett was not asked the source of her money. She was merely questioned with respect to whether she was telling the truth. She could have simply answered, "yes, I did have that kind of money." Instead, she volunteered the source of her money. Corbett's testimony that she "worked a lot" implied that the money she allegedly spent on drugs was employment related. Thus, if Corbett falsely represented to the IRS and to the FIA that she did not work during that same time period, she could be subject to criminal sanctions for welfare and tax fraud, and her testimony in this regard could be used in a criminal prosecution to show that she committed perjury by representing to the IRS and FIA, under oath, that she did not work, but representing to the court, under oath, that she did have employment income. Consequently, we conclude that Corbett waived her privilege against self-incrimination with respect to potential fraud charges when she volunteered that she worked. This statement bolstered her claim that she purchased \$40,000 worth of drugs from defendant; therefore, defendant should have been allowed to impeach that testimony where her sworn statements showed that she did not work during that time period. However, we conclude that this error was harmless.

While a limitation on cross-examination that prevents a defendant from eliciting testimony from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation, violations of the right to adequate cross-examination are nonetheless subject to harmless-error analysis. *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). Whether such an error was harmless depends on a host of factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *Id.* at 644-645. In reviewing a claim of preserved constitutional error, the beneficiary of the error must prove, and the appellate court must determine beyond a reasonable doubt, that there is no "reasonable probability that the evidence complained of might have contributed to the conviction." *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994), quoting *Chapman v California*, 386 US 18, 23; 87 S Ct 824; 17 L Ed2d 705 (1967). See generally, *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999).

Here, we conclude beyond a reasonable doubt that there is no probability that Corbett's testimony might have contributed to the conviction. Even if defense counsel had successfully impeached Corbett and convinced the jury that she was not a credible witness, we find that the prosecution presented sufficient evidence to establish defendant's guilt beyond a reasonable doubt. Linda Sullivan and Carrington testified with respect to defendant's drug trafficking activities. The police arranged a controlled buy, during which Sullivan purchased \$210 worth of marijuana from defendant. In addition, the police conducted a search of defendant's home and yard and seized a substantial amount of drugs and drug-related contraband. We are convinced that the overall strength of the prosecution's case, as demonstrated by the other evidence of drug use and drug trafficking, was sufficient for a reasonable juror to conclude that defendant was guilty of the charged offenses.

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Michael R. Smolenski

¹ We note that the record does not contain the original signed order, but only a copy of the first page of the order.